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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 163

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION and others,
Defendants in Error.

PETITION FOR REHEARING

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Commodities Trading Corporation, et als., plaintiffs in error in the above entitled cause, No. 163, and defendants in error in the above entitled cause No. 156, which said causes were cross-appeals from the same judgment of the Court of Claims, and in which causes judgment

was rendered by this Court reversing the said judgment of the Court of Claims, said judgment of this Court having been entered on the 27th day of March, 1950, and within fifteen days therefrom and at the same term of Court, present their petition for rehearing of the above entitled causes and in support thereof, respectfully show

That this Court in reversing the judgment of the Court of Claims on the ground that that Court found a value for petitioner's pepper on May 26, 1944 in excess of the established ceiling price of 6.63 cents per pound on that day for said pepper appears to have overlooked the following matters and facts:

I.

This Court in ruling out so-called retention value raised objections thereto which were applicable to the findings of the Court of Claims, but overlooked the fact that its criticisms did not apply to the undisputed evidence in the record.

Thus, the findings of the Court of Claims were in many cases inconclusive and weak where the evidence was direct and strong.

The opinion of the Court of Claims states:

> "This so-called retention value is particularly applicable in this case." And, further, "a very great increase in price was inevitable upon the removal of restrictions." (R. 25)

but it did not find as facts much of the undisputed evidence presented by Commodities to sustain that statement.

Commodities filed exceptions to each deviation from the evidence and from each failure to find in accordance therewith, and assigned such deviations as errors in its petition for certiorari to this Court. The following assignments of error relate to the Court of Claims failure to make factual

findings supporting its finding of "Retention Value". (Assignments of Error, Nos. 17, 18, 20-22, 49-54.)

This Court, in rejecting so-called retention value said

> "A persuasive reason against the general rule declared by the Court of Claims is the highly speculative nature of proof to show possible future prices * * *. Predictions on these subjects were guesses, not informed forecasts."

But the Court also said:

> "And exceptional circumstances can be conceived which would justify resort to evidential forecasts of potential future values in order to determine present market value."

Commodities submits that if ever a case could be presented wherein it was proper to consider potential future values in order to determine present market value, the case at bar is that case.

The facts show not a possibility or a probability of a great shortage in the supply of pepper at the end of the War, *whenever that time might come*, but certainty of a great shortage.

Commodities freely concedes that the post-control prices could not be definitely determined, or the extent to which the lifting of war controls would raise prices above the controlled ceilings.

It submits, however, that this Court overlooked the inevitableness of post-control prices substantially in excess of the ceiling prices, and of the 15 cents allowed by the Court of Claims.

Considering the facts more in detail in support of Commodities claim that the circumstances here were exceptional and did justify resort to forecasts of potential future values:

(a) A pepper shortage was on the way, war or no war:

Pepper was a difficult and expensive crop to plant and required, after planting, constant cultivation and care to

protect it from being swallowed up by the jungle (R. 98-99); no production from the pepper vines was obtainable for the first four years after planting, but from four to seven years after planting there was some production, with normal production obtained at the end of the seventh year (R. 99, 107). Moreover the plant did not continue to live beyond fifteen years in all on the average—eleven years after it first began to bear—and constant new planting was therefore necessary to maintain production (Fdg. No. 26, R. 22, 99).

For approximately five years immediately preceding invasion of Indonesia by the Japanese in February 1942, there had been practically no planting of new vines (R. 101-2, 107), but, on the other hand, established gardens were neglected and the jungle was permitted to reclaim them, due to the unprecedented low prices (R. 100, Fdg. 26, R. 22).

(b) The Japanese war served to greatly intensify the inevitable cycle:

It was further shown that pepper production suffered greatly and permanently from the Japanese invasion and that it would be much smaller by reason thereof than it had been before the War (R. 45).

Finally, it was shown that after the Japanese invasion and throughout the Japanese occupation, the native "instead of planting pepper, he brought down his vines and started planting foodstuffs." (R. 102)

All this had taken place and was well-known prior to May 26, 1944.

There was no word offered by the Government in contradiction of or in modification of any of the above.

The Court correctly says that no one could foresee the date of the termination of the War, and makes this as a most important argument against the consideration of market price at the end of the War, but the Court overlooks the fact that the longer the War lasted, the greater the shortage of pepper would be.

For Sumatra was practically our sole source of supply, and until four years after the natives began to replant pepper, there would be no pepper from new vines, and until seven years thereafter there would be no substantial amount from new vines (R. 97-99). In the meantime, the eleven year life of all the old vines planted before the War and before the cessation of planting in 1936 would have expired (R. 99).

So much for the proof of supply.

The proof also showed that for two thousand years there has been a constant demand for pepper in a large part of the civilized world and that consumption per person is so small (⅛ lb. per annum for household consumption and ¼ lb. including industrial use, R. 50) that the demand is not affected by the price, particularly as the price to the consumer of the small containers in which he purchases pepper does not change with even violent changes in the wholesale price of whole black pepper. (R. 50)

(c) With a normal demand so great a shortage must result in greatly increased prices as soon as repressive ceiling was removed.

With a normal prewar demand as shown above and with the definite shortage above explained, it was certain that something would happen akin to what has actually happened, namely, a price for pepper rising from 50 to 60 cents at the date of decontrol to $1.40 at the present time (Fdg. 17, R. 18).

While the above has been due in some part to inflation, and while no one could prophesy precisely what would take place, any tyro familiar with the pepper business would know that decontrol would be followed by high prices many times 6½ cents no matter when it took place.

The Court said at p. 5 of its opinion:

> "But the general Constitutional rule declared and applied by the Court of Claims did not rest on exceptional circumstances."

The Court overlooks the fact that the cases where the Court of Claims allowed retention values were exceptional and in the case at bar in its opinion (R-26) uses the following language:

> "Commodities bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must *inevitably* come." (Italics ours)

and further:

> "A very great increase in price was *inevitable* upon the removal of restrictions". (Italics ours)

For a Court to state that a future price is *inevitable* shows most exceptional circumstances and it appears that the theory of the Court of Claims with respect to so-called "retention value" does not depart from the opinion of this Court that only in exceptional circumstances can proof with respect to future prices be considered as evidence bearing upon present just compensation.

In *Kaiser* v. *The United States*, 69 Fed. Supp. 555, the property requisitioned consisted of partly manufactured brass material which the Government claimed the right to requisition at the price for scrap.

The plaintiff's business was an established business, its product was in general use and it was, humanly speaking, certain that the manufactured parts would be usable in its product at the end of the War. The Court of Claims cut severely the probable value to allow for capital tie-up, expense of storage, deterioration, and other factors.

This was an unusual situation where the property was sure to be usable at the end of control, and where the work done in processing the material would have substantial value.

The Court was very conservative in its allowance and the just compensation was less than anyone would say the

Kaiser Company was practically sure to get at the end of the War.

In *Pantex Pressing Machine Company* v. *The United States*, 71 Fed. Supp. 859, the War Production Board requisitioned aluminum, in a manufactured form of parts for certain dry-cleaning and pressing machinery, having offered the program price of 13½ cents per pound for aluminum. The proof showed that the parts had a value considerably in excess of that figure by reason of their post-war usefulness and a cost in excess of the said program price. The Court allowed an amount equal to the program price for certain obsolete parts and considerably in excess of the program price for those parts which would be usable after wartime restrictions were removed.

II.

This Court overlooked the fact that by making no allowance for so-called "retention value" and by restricting the compensation for Commodities' pepper to only a part of its value and to a part of the loss which Commodities incurred through the requisitioning thereof, it was proceeding in contradiction of the rule for just compensation which has been established by this and other courts for many years.

In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, referred to by the Court in its note on page 3 of this Court's opinion herein, the Supreme Court said

> "There can, in view of the combination of those two words (just compensation), be no doubt that the compensation must be a full and perfect equivalent for the property taken."

And later:

> "The legislature may determine what private property is needed for public purposes * * * but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the

> public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

This was merely a restatement of what was the settled law in 1892, and since that time there have been numerous decisions of this Court to the same effect, and numerous decisions of State Courts defining similar provisions in State Constitutions in the same manner and holding that the full loss of the owner must be compensated for.

See the following cases where the foregoing conception of "just compensation" was expressed:

Seaboard Airline Ry. v. *United States*, 261 U. S. 299, 304;
United States v. *New River Collieries Co.*, 262 U. S. 341, 343;
United States v. *Miller*, 317 U. S. 369, 373;
United States v. *John J. Felin Co. Inc.*, 334 U. S. 624.

In the case at bar, this Court does not overrule those decisions, and even in the recent case of the *Felin Company*, no one of the nine judges who passed on just compensation in the four opinions written, suggested that the *Felin Company* was not entitled to "just compensation" measured by what it had actually lost.

In that case the concurring opinion of Mr. Justice Reed went further than any previously decided case in suggesting that the loss of the owner of property requisitioned could not be greater than the ceiling price fixed therefor when the property *was perishable*. That is to say, that the Government can by one lawful act destroy all present value in a property in excess of a fixed price, and then may requisition at that fixed price.

However, in the *Felin Case*, the Felin Company had to sell its pork chops. It could not sell for more than the ceiling price, and the Court argued that the property had no present value greater than such fixed price and the Felin Company suffered no loss through the taking of its chops, in excess of the price at which they could have been sold presently, *when the selling was a "must"*.

The majority of the Court seems to have accepted that theory in the case at bar, and Commodities recognizes the logic thereof and bows thereto. However, it submits that the ceiling prices applied to pepper did not destroy all value in excess of 6.63 cents per pound, but that the undisputed evidence showed a large residue of value greater than such ceiling price and above 15 cents, measured by the right and ability to hold till decontrol and sell at the prices then obtaining, less a discount for expenses.

Thus, the value of the property for the purpose of determining "just compensation" in cases where there are lawful Governmental restrictions upon its use, is only that part of its full value that remains after giving effect to the depressing influences of the Governmental restrictions. However the loss occasioned by the taking of a commodity which lasts unimpaired in value, which is easily and cheaply stored, is greater than the ceiling price, where it can be shown that the market price at the end of price control, less the costs and hazards of keeping and storing until that time, will be substantially greater than the ceiling price.

For illustration, with pepper selling at $2.00 a pound in countries where there was no price control, and where it was physically possible for Commodities to take its pepper to such market, we may start with $2.00 as the full or intrinsic value of black pepper, which of course had a world market. But exports of pepper from the United States were restricted and prices for such exports were also restricted. Furthermore, ceiling prices restricted the amount which could be obtained currently upon sales in the United States.

Thus, the intrinsic value was cut down to what could be expected at the end of control as a practical certainty, less a reasonable discount for the expense and delay in holding until that time.

The expression "retention value" is not descriptive and was, perhaps, an unfortunate choice of words. A more definite and accurate description of the factor in question is "remaining value", remaining after giving effect to governmental restrictions.

What the Court of Claims was striving for and what Commodities was asking was the actual loss which it sustained by reason of the taking of its pepper.

As to the market price at the end of control it was the unanimous opinion of the Spice Trade in 1944 that such prices would be substantially in excess of 30 cents per pound. They had risen to over 40 cents a pound in 1926 because of a crop failure in one year. They were from 50 to 60 cents. Thus, an award of 15 cents a pound was most moderate.

III.

The Court overlooked the importance of the fact that a scarcity of pepper by 1944, with consequent high prices was inevitable (Fdgs. 9, 26, R. 16, 22-3). The War only accentuated this scarcity. This importance is enhanced by the opinion of the Court, which states as follows:

> "Whatever the circumstances under which such constitutional questions arise, the dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?"

The undisputed evidence showed that due to the abnormally low prices for pepper which had prevailed for five years or more previous to the invasion of Sumatra in February, 1942, there had been no planting of new pepper for five years previous to that time and that pepper gardens

had been neglected and allowed to be reclaimed by the jungle, with the inevitable result, in view of the characteristics of the pepper plant, that there would be a definite shortage of pepper following 1942 and extending until 1948 or 1949, if there had been no War (R. 99-102).

This would have inevitably caused high prices by 1944, much higher than the ceiling price. The effect of the War was to destroy pepper and reduce the supply and increase prices where uncontrolled. In such circumstances there was nothing "just" in the Government's maintaining a ceiling price for pepper in 1944 lower than it would have been had there been no War and taking Commodities' property at that price.

Moreover when Commodities' pepper was taken from it in 1944 at a time when there was a real scarcity (R. 46, 102) and an actual high price for pepper throughout the world wherever the price was not kept down by Government control, it would not have been fair or just to Commodities to pay it for its high priced and enhanced valued pepper at an amount less than the pepper would have been worth if there had been no additional scarcity caused by War.

IV.

In stating that the ceiling price was fair and just to the trade in 1944 this Court overlooks the fact that there was a unanimous opinion, except for O. P. A., that the price was unfair.

Thus, when the Army desired a million pounds of pepper in October, 1943, Commodities offering to sell at less than cost, fixed a price of 9¾ cents per pound. This the Army accepted. (Fdg. 22, R. 20) The Committee of the Spice Trade was unanimous in urging O. P. A. to increase its price to 20 cents and let in the Indian pepper. (Fdg. 16, R. 18, 42, 46).

The Department of Agriculture and the Joint Control Board arranged for the ear-marking of 20,000,000 pounds of Indian Pepper to be imported at the Indian Market Price, which was then 21 cents per pound (R. 42).

The ceiling price in England, which controlled the production of practically all new pepper, was 25 cents per pound.

There was a depressed market at the time the ceiling price was first fixed, (R. 89-90, 108-109, Fdg. 8, R. 15) but, be that as it may, there was a complete change in the situation between February, 1942 and May, 1944. (Fdg. 14, R. 18, 60, 79, 46, 102)

V.

Commodities has sustained the burden of proving special conditions and hardships peculiarly applicable to it. Commodities was not a regular dealer in pepper and for this reason was deprived of rights which the O. P. A. conferred upon regular dealers who were distributors of pepper. (Fdg. 5, R. 13-14, 45-46)

Thus, other importers of large quantities of Whole Black Pepper termed "bulk dealers", such as the witness Catz, were permitted to grind and sell their pepper as ground pepper, but this was denied to Commodities except with respect to certain limited purchasers such as Red Cross Steamships, etc. (R. 45-46; F. D. O. 19)

Moreover, other dealers whose practice it was to buy and sell pepper, turning it over quickly, were allowed the same price as Commodities, which was an investor and had stored its pepper, some of it for as much as eleven years. The country was benefited by the unusual fact of Commodities accumulating 25 million pounds over a long period of years. (Fdg. 5, R. 13-14) This accumulation could not have been made without dislocating the market unless it had been made over a number of years. But this involved storage and carrying charges, for which no allowance has been made to Commodities. (Fdg. 24, R. 21-22)

The statement of the Court that the situation of Commodities differed only in degree, if at all, from that of myriad commodity owners who quite naturally wished to hold their goods for higher prices overlooks the fact that Commodities is asking no more than the market price would have been in 1944 if there had been no War.

Moreover, dealers generally must continue to sell their trade and in very few cases would an owner of property be justified on a purely business basis of holding a large inventory until the end of the War in the hope that the market price at that time might be higher.

There is no comparison between Commodities and the ordinary merchant.

VI.

This Court overlooked the fact that unless the petitioners planned to sell their pepper during price-control, which of course they did not plan to do, there was neither reason nor obligation impelling them to challenge the ceiling price which at best was a purely temporary restriction.

This Court in emphasizing the right of review of a ceiling price also has overlooked the fact that the Emergency Price Control Act as it stood in May, 1944 and from the beginning until June 30, 1944 when the limitations of the Act were recognized and it was amended, provided for a review of the ceiling price in name but not in fact. (Title 50, U. S. C. A. § 923)

Thus, a protest was required to be made within sixty days after the ceiling price was fixed. If no such protest was made the ceiling price could not be attacked.

Furthermore, the review by the Emergency Court of Appeals was limited to a determination that the price schedule was "arbitrary or capricious", a well-nigh impossible task in Wartime. The Court had no right to substitute its judgment for that of the Administrator. (Title 50, U. S. C. A. § 924)

If Commodities' petition for a rehearing is denied, a modification of the judgment of the Court is requested on the following grounds and to the following extent:

Commodities tried its case before the Court of Claims in accordance with the rules which had been laid down by that Court, particularly in *Kaiser* v. *United States*, 69 Fed. Supp. 555, and *Pantex Pressing Machine* v. *United States*, 71 Fed. Supp. 859, and emphasized the so-called "retention value". But, in addition thereto, it proved many of the factors which it considered bore on the question of value and just compensation, such as the ceiling price for ground pepper, the ceiling price for imitation or synthetic pepper, and the fact that Regulation 52 did not impose a ceiling price at all on pepper sold in quantities of less than one bag (that is, in amounts less than approximately 150 pounds each).

The Court of Claims found the facts with respect to these various items, except the last named, concerning which no finding was made, and probably none was necessary, as the Court takes judicial notice of Government Regulations, and rendered judgment for plaintiffs.

However, the findings of the Court of Claims were generally much weaker than the proof, and with respect to the above enumerated matters, the Court did not find that Commodities was currently able to sell its pepper at the price fixed for ground pepper or the price for synthetic pepper, although the evidence to support such a finding was introduced and Commodities assigned error to the failure to find such facts.

Certainly, if Commodities had had the right in 1944 to sell ground pepper at the OPA ceiling price of 12 cents per pound and upward, and if the additional cost of selling the pepper as ground pepper, rather than as whole pepper, was approximately two cents the value of the pepper and

the loss sustained by Commodities by reason of the taking of it was at least 10 cents. So with respect to the ceiling price of synthetic pepper, if the details had been proven and found by the Court of Claims with respect to the ability to sell at such ceiling price, with a net return of more than 15 cents per pound upon the pepper used, after allowing for grinding and the cost of the neutral agents, the value of the pepper and the loss to Commodities could not have been less than such amount.

In this connection, it must be recollected that conditions in Indonesia were most unsettled up to the close of Commodities' case, and that the life of a white man was not safe in many portions of Sumatra and Java. The testimony showed that Commodities' witness, the Hollander Greisheimer, had recently been released from a Japanese prison camp where he had spent several years.

In all of the above circumstances, Commodities submits that if this Court reverses, the proper form of judgment for this Court to render is a reversal and a direction for a new trial in accordance with the opinion of this Court.

A direction to the Court of Claims to find "just compensation" at the ceiling price of 6½ cents should be rendered only in case the Court is prepared to go so far as to hold that the ceiling price is the only factor which can be considered in determining "just compensation".

WHEREFORE, upon the foregoing grounds it is respectfully urged that this petition for a rehearing be granted and that

(1) The judgment of the Court of Claims be, upon further consideration, affirmed, or

(2) In the event that this Court should, after such rehearing, decline to affirm the judgment of the Court of Claims, that this Court modify and amend its judgments

herein by directing the Court of Claims to receive further evidence of the value of petitioners' pepper and of just compensation, if offered, and to make further findings of value and just compensation in accordance with the principles of law established by this Court in its opinion herein.

Respectfully submitted,

EDWARD L. BLACKMAN,
Counsel for COMMODITIES TRADING CORPORATION, *et als.*

I, Counsel for the above named COMMODITIES TRADING CORPORATION, *et als.*, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EDWARD L. BLACKMAN,
Counsel for COMMODITIES TRADING CORPORATION, *et als.*